

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO.42 OF 2006

1. M/s.Kelkar Trading Corporation
a firm engaged in trading
activities and having its office
at R.B. Munshi Compound, Near
Raghvendra Temple, Raghvendra
Mandir Road, Oshiwara,
Jogeshwari, Mumbai - 400 102
2. Shri Chintamani Shridhar Kelkar
having his office at R.B. Munshi
Compound, Near Raghvendra
Temple, Raghvendra Mandir Road,
Oshiwara, Jogeshwari,
Mumbai - 400 102. .. Appellants.

V/s.

Commissioner of Central Excise,
Mumbai-V, 5th Floor, Utpad
Shulk Bhawan, Plot No.6-24,
Bandra-Kurla Complex,
Bandra (E), Mumbai - 400 061 .. Respondent.

Mr.V. Sreedharan with Mr.Bharat Raichandani i/b.
M/s.PDS Legal for the appellants.

Mr.K.R. Chaudhari i/b. Dr.T.C. Kaushik for the
respondent.

**CORAM : R.M. LODHA &
J.P. DEVADHAR, JJ.**

DATED : 7TH APRIL, 2006.

ORAL JUDGMENT (Per R.M. Lodha, J.)

We heard Mr.V. Sreedharan, the counsel for
the appellants and Mr.K.R. Chaudhari, the counsel
for the revenue.

2. The following substantial questions of law

arise in this appeal :

1) In view of the difference of opinion amongst two members of the bench, to the specific question referred to the third member, whether the third member could go beyond the question and take a view different from both the members of the bench who referred the question ?

2) Whether on the basis of the opinion of the third member, upon the matter being referred to the bench, the order of remand passed by the bench is ambiguous and equivocal ?

3. We thought it fit to dispose of the appeal itself at this stage and we considered the matter accordingly.

4. The show cause notice dated 30th September, 2001 was issued alleging therein that the appellants manufactured stators of sub-heading 8503.00 by the process of riveting and cleating of chapter sub-heading 8312.00 and had removed the said goods as second sale under the guise of trading of 'Electrical Motor Stampings' without payment of duty. The appellants were asked to show cause;

a) why the (goods stated to be) Stators of different sizes of value of Rs.2,36,045.00 and loose Electrical Stampings of different sizes of total value of Rs.9,17,562.00, seized under panchanama dated 5/6.1.2001, should not be confiscated under Rule 173-Q(1) of the Central Excise Rules, 1944;

b) why the Central Excise duty amounting to Rs.28,04,699.00 leviable on Stators of total value of Rs.5,54,50,195.00 alleged to have been manufactured and cleared, during the period from 1.7.1996 to 4.1.2001 as detailed in Annexure B to the show cause Notice, should not be demanded and recovered from us under sub-section (1) of Section 11A of the Central Excise Act, 1944 and the proviso thereto;

c) why penalty should not be imposed, under Rule 173-Q of the Central excise Rules, 1944;

d) why penalty equivalent to the amount of duty, should not be imposed, under section 11-AC of the Central Excise Act, 1944;

e) why interest @ 24% per annum, should not be demanded and recovered, u/s.11-AB of the Central Excise Act, 1944; and

f) why an amount of Rs.5,00,000.00 (stated to have been voluntarily) deposited by TR-6 challan No.0038/00-01/23/624/1 dated 11.1.2001 for Rs.3,00,000.00 and TR-6 challan No.0038/00-01/23/633/1 dated 13.1.2001 for Rs.2,00,000.00, towards the Central Excise duty, should not be appropriated against the duty amount demanded and/or fine and/or penalty imposed, if any,

5. The appellants filed reply to the show cause notice on 30th September, 2001 and refuted the allegations. It was submitted that cleated and riveted stampings sold by them were not sold as stator as they require much more processes to become stators. Only because these are used in electric motors after stator processing would not make them stators or a part of electric motor. The electric stampings in riveted or cleated forms do not possess the property of stator nor these are capable of being used as stators in that stage as they have not been equipped with stator properties. In common parlance, these are known as cleated or riveted stampings and not complete stators.

6. The Commissioner, Central Excise, Mumbai - V after hearing the appellants vide his order-in-original dated 27th February, 2002 / 4th March, 2002 confirmed the central excise duty of about Rs.28,04,999/- and imposed penalty also to that extent under Section 11AC read with Rule 173Q of Central Excise Rules, 1944 in so far as the first appellant is concerned and imposed penalty of Rs.12,00,000/- against the appellant No.2 under Section 209A of the Central Excise Rules, 1944.

7. The appellants preferred separate appeals against the order-in-original bearing Appeal Nos.E/1199 and 1200/02 Mum.

8. The aforesaid appeals came up for hearing before the bench comprising of Mr.Krishna Kumar, (Judicial Member) and Mr.S.S. Sekhon (Technical Member). The appeals are said to have been heard by the aforesaid bench on 1st March, 2004. We are informed that after about 11 months, two separate orders (these orders do not bear the date) came to be passed by the members with difference of opinion. Mr.Krishna Kumar, Judicial Member, confirmed the duty demand raised in the order-in-original and set aside the order of penalty. Mr.S.S. Sekhon, Technical Member was of the view that it was imperative to come

to the conclusion as to whether the activity carried on by the first appellant amounted to manufacture as envisaged under the Central Excise law and since the adjudicating authority did not advert to this aspect, the matter needed to be remanded back to the adjudicating authority to reach the conclusion as to whether the activity carried on by the first appellant amounts to manufacture. According to him, the other issues regarding eligibility of credit and working out of duty and the penalty could be re-determined as per settled law.

9. In the light of difference of opinion amongst the members of the bench, the following question was referred to the third member.

Whether in the facts of this case, the matter is required to be remitted back to redetermine the question of manufacture and other issues thereafter or the appeals are required to be dismissed ?

10. The President of the Tribunal referred the aforesaid question to Mr.Mohed Ali M. (Technical Member).

11. Mr.Mohed Ali M., Technical Member, to whom the question was referred took altogether different

stance. Though he was of the view that the matter needed to be remanded but according to him it was necessary for recomputation of the assessable value and the duty amount and not for determining whether or not the process of manufacture is involved.

12. Upon receipt of the opinion of the third member, the original bench passed the following order :

‘In view of the reference answered by third member, this appeal is allowed as Remand’.

12. The question that was referred did not give latitude and freedom to third member to take any view. The third member could have only taken either of the view expressed by the members of the bench. He could have either held that the matter needed to be remanded back to determine the question whether the activity carried on by the first appellant amounts to manufacture or that the duty demand deserve to be confirmed. But none other. The reference to the third member was limited. However, the order of third member shows that he entered the arena which was not the subject-matter of reference. He took the view which was not the view of either of the members of the bench. The third member to whom the question was referred plainly overstepped the

limits of his jurisdiction. He proceeded as if he was completely free in dealing with the reference and could opine on the point which was not the difference of opinion. He ought to have confined to the difference between the two members as was reflected in the question referred to him. We hold that the third member could not go beyond the question and he erred in taking a view different from both the members.

13. Upon receipt of the opinion of the third member, the disposal of the appeal by the bench that the appeal is allowed as remanded is highly ambiguous. What is the scope of remand is not clarified. If the bench meant remand of appeal is confined to recomputation of assessable value and redetermination of duty amount as observed by the third member, then the remand is bad-in-law as the order of third member is beyond the scope of reference. On the other hand, remand to the adjudicating authority, if, was to consider the aspect of manufacture, the order ought to have said so. It could not have been left to the adjudicating authority to draw its own conclusion from the order of remand.

14. The members of the Tribunal have not considered the appeal with clarity and confused the

issues. We answer the second question accordingly.

15. We are, thus, of the view that the two appeals being E/1199 and 1200/02-Mum need to be heard afresh by the Tribunal. The President of the Tribunal may consider assigning these appeals to a bench not comprising of the members who had occasion to hear the appeals and the reference earlier.

16. The result is that this appeal is allowed; the impugned order is set aside and appeals E/1199 and 1200/02-Mum. are restored to the file of the Tribunal for fresh hearing and disposal as indicated above and in accordance with law. No costs.

(R.M. LODHA, J.)

(J.P. DEVADHAR, J.)